SATHIASEELAN NAGAPPAN v. KETUA PENGARAH, PERTUBUHAN KESELAMATAN SOSIAL

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
VAZEER ALAM MYDIN MEERA JCA
MOHD NAZLAN GHAZALI JCA
[CIVIL APPEAL NO: A-01(A)-412-07-2021]
6 APRIL 2023

Abstract – *An employee, making his journey back to work on his off-day in order to arrive at work at his workplace the next day, is deemed to be 'travelling on a journey made for any reason which is directly connected to his employment' within the meaning of s. 24(1)(b) of the Employees' Social Security Act 1969. The degree of connection to his employment by his activity would vary but is still ultimately related to his employment, as in, he would not be making the journey on a Sunday evening if not for his employment on a Monday morning. The injury arising out of a commuting accident along that journey is then deemed to be an injury that arose out of and in the course of his employment and he would be able to claim for disability benefit arising out of such an 'employment injury'.*

LABOUR LAW: *Employment – Employee – Claim under Employees' Social Security Act 1969 – Journey back to work on Sunday to arrive at workplace on Monday morning – Employee met with accident and suffered temporary disability – Claim from Social Security Organisation (SOCSO) for benefits under insurance scheme – Whether 'employment injury' – Whether arose out of or in course of employment – Whether deemed to be 'travelling on a journey made for any reason which is directly connected to his employment' – Employees' Social Security Act 1969, s. 24(1)(b)*

WORDS & PHRASES: *'travelling on a journey made for any reason which is directly connected to his employment' – Employees' Social Security Act 1969, s. 24(1)(b) – Employee made journey back to work on Sunday to arrive at workplace on Monday morning – Employee met with accident and suffered temporary disability – Whether employee entitled to claim for benefits under insurance scheme for employment injuries suffered in course of employee's work*

The appellant was travelling from his house in Ipoh, Perak to Kulim, Kedah on a Sunday evening to rest for the night in his place of stay in Kulim and proceed to work in Kulim. It was his practice every weekend to go home to Ipoh, where his place of residence was, to be with his family for the weekend. On that fateful day, the appellant met with an accident. He claimed from the respondent for temporary disability benefits under a compulsory

fault-free insurance scheme for employment injuries suffered in the course of an employee's work as in arising out of or in the course of his employment. The respondent refused payment on the ground that the injury sustained was not an 'employment injury', pursuant to s. 2(6) read together with s. 24(1)(a), (b) or (c) and s. 24(2) of the Employees' Social Security Act 1969 ('ESSA'). Dissatisfied with the respondent's decision, the appellant applied to the Social Security Appellate Board ('Appellate Board') but the Appellate Board agreed with the respondent and dismissed the appeal. The appellant then took up the matter to the High Court and the appeal was allowed. The High Court set aside the decision of the Appellate Board and directed for the matter to be reheard before a different panel. The Appellate Board again dismissed the appeal and the appellant appealed again to the High Court. This time, the High Court dismissed the appeal on the grounds that (i) the injuries suffered were not 'employment injuries' as they did not arise out of or in the course of his employment; and (ii) s. 24(1)(b) of the ESSA did not apply as the journey from his home in Ipoh to Kulim was not one that was necessary to be performed or undertaken for his work. According to the trial judge, it would have been different if the injury was sustained while travelling to work and had been from his house in Kulim to the factory in Kulim where he worked. Hence, the present appeal. The appellant contended that: (i) although there was a break in the journey in Kulim from Ipoh to Kulim on a Sunday evening before proceeding to work in Kulim the next day, it was nevertheless a journey undertaken because of his need to work in Kulim; and (ii) the ESSA, being a piece of social legislation, should be interpreted expansively and any doubt should be resolved in favour of the insured appellant in line with the *ethos* of the ESSA which was to provide social security to workmen insured under the scheme in the event of certain contingencies happening. The respondent on the other hand argued that there was nothing vague about the meaning of 'employment injury' and that the journey from Ipoh to Kulim was not instructed or required by the employer but one that the insured had chosen for his own sake and that the journey made on a Sunday when it was not a working day was rather remote from work which would only start the next day. According to the respondent, this was not a case where the injury had been sustained while travelling to work from his house in Kulim to the factory in Kulim.

Held (allowing claim and setting aside decision of High Court; matter remitted back to respondent for hearing claim on merit with respect to assessing disability benefit payable to appellant)
Per Lee Swee Seng JCA delivering the judgment of the court:

(1) It was not disputed that the appellant was an 'insured person' within the meaning of s. 2(11) of the ESSA where it was defined as 'a person who is or was an employee in respect of whom contributions are, were or could be payable under the Act, notwithstanding that such industry or

employee was not so registered, so long as the industry was on to which this Act applies'. It has been decided by our courts that the injury caused by an accident need not have happened at the workplace. It may happen outside the workplace for so long as the accident arose out of and in the course of his employment with his employer. (paras 25 & 29)

(2) There could be a myriad of reasons for making the journey back to Kulim from Ipoh on an off-day such as the need to properly rest on a Sunday in Kulim to be in a better frame of mind to work on a Monday morning. Indeed, his employer and the Social Security Organisation ('SOCSO') were not concerned with how he would arrive for work on a Monday morning at 8am at the factory in Kulim save for the fact that he must be there to clock in or report to work. The law cannot be so alienated from nor insulated and isolated from the harsh realities of life and the rough and tumble of it all. The realities of life would include for many the need to travel long distances for those work outstation so that they may be with their families either on weekends or even a mid-week journey home. (paras 39-41)

(3) The appellant's journey from his place of residence in Ipoh, where he stayed with his family during the weekends starting Friday night to Sunday evening, back to Kulim, on Sunday evening, was clearly a journey made which was 'directly connected' to his employment, following which the deeming provision of s. 24(1)(b) of the ESSA would apply. There is no requirement that the employer must have instructed him to make the journey. The said journey from Ipoh to Kulim on a Sunday evening was necessary for him to arrive at Kulim for work the next day after having rested a night in his place of stay in Kulim. (paras 43-45)

(4) From the facts in the instant case, the interruption or deviation, even if the stopover at his place of stay in Kulim for the night was considered one, did not make the journey to be one totally unrelated to his employment or outside the scope of coverage under the SOCSO scheme. There was no other reason for making that journey back to Kulim on a Sunday other than to properly rest on the Sunday night so as to arrive fresh and rejuvenated for work on a Monday. For so long as it is not an economic or enjoyment pursuit as in a holiday but that the commuting is necessary for work in the way the employee had so arranged his routine, he should not be left high and dry when an accident should happen that caused him to suffer an injury. Such an injury would be work-related and an 'employment injury' within the meaning of s. 2(6) of the ESSA, entitling him to make a claim for the disability suffered as a result. (paras 92, 95, 100 & 101)

Case(s) referred to:

All Malayan Estates Staff Union v. Rajasegaran & Ors [2006] 4 CLJ 195 FC ***(refd)***

Cooper & Dysart Pty Ltd v. Sargon (1991) 4 ACSR 649 ***(refd)***

ECM Libra Investment Bank Bhd v. Foo Ai Meng & Ors [2013] 1 LNS 99 CA ***(refd)***

Ketua Pengarah Pertubuhan Keselamatan Sosial v. Jusoh Abu Bakar [2003] 1 CLJ 383 HC ***(refd)***

Ketua Pengarah, Pertubuhan Keselamatan Sosial v. Mohd Zaili Ali [2003] 4 CLJ 165 HC ***(refd)***

Ketua Pengarah Pertubuhan Keselamatan Sosial v. Tham Tian Sion [2008] 8 CLJ 341 HC ***(refd)***

Ketua Pengarah Pertubuhan Keselamatan Sosial v. Vadivelan Sandara Saigara [2008] 9 CLJ 428 HC ***(refd)***

Ketua Pengarah Pertubuhan Keselamatan Sosial lwn. Yazmin Mohd Sulaiman [2018] 8 CLJ 203 HC ***(refd)***

Patrick Ho Chang v. Pertubuhan Keselamatan Sosial [2020] 1 CLJ 284 HC ***(refd)***

Ratnam v. Cumarasamy & Anor [1964] 1 LNS 237 FC ***(refd)***

Suruhanjaya Pilihan Raya & Ors v. Kerajaan Negeri Selangor & Another Appeal [2018] 1 CLJ 258 CA ***(refd)***

Weaver v. Tredegar Iron and Coal Co Ltd [1940] 3 All ER 157 ***(refd)***

Wong Yew Loy v. Ketua Pengarah Pertubuhan Keselamatan Sosial [2010] 5 CLJ 467 HC ***(refd)***

Legislation referred to:

Companies Act 2016, ss. 465(1)(e), 466(1)(a)

Employees' Social Security Act 1969, ss. 2(6), (11), 15(b), 24(1)(a), (b), (c), (2), 91(2)

Interpretation Acts 1948 and 1967, s. 17A

Companies Code [Aus], s. 553(2)(a), (b)

Workmen's Compensation Act 1925 [UK], s. 1(1)

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For the respondent - Muhammad Suhaib Ibrahim; M/s Skrine

[Editor's note: Appeal from High Court, Ipoh; No: AA-16-6-10-2020 (overruled).]

Reported by Lina E

JUDGMENT

Lee Swee Seng JCA:

[1] The appellant was travelling from Ipoh to Kulim on a Sunday evening so that he could rest for the night in his rented house at his place of stay in Kulim and then proceed to work at Infineon Technology Sdn Bhd in Kulim itself in a better shape after a good night's rest. It was his practice every weekend to go home to Ipoh where his place of residence is so as to be with his family for the weekend. On that fateful day on 16 October 2016 at about 5pm he met with an accident on the way from Ipoh to Kulim.

[2] He claimed from the respondent for temporary disability benefits under a compulsory fault-free insurance scheme for employment injuries suffered in the course of an employee's work as in arising out of or in the course of his employment. The respondent, also referred to as the Social Security Organisation or more popularly called SOCSO, to whom his employer and him have been faithfully contributing towards the insurance scheme, refused payment on the ground that the injury sustained is not an "employment injury".

[3] The respondent rejected his claim on 10 January 2017 on the basis that the injury arising from the road accident while commuting is not an "employment injury" pursuant to s. 2(6) read together with s. 24(1)(a), (b) or (c) and s. 24(2) of the Employees' Social Security Act 1969 ("ESSA").

[4] Dissatisfied with the said decision of the respondent, the appellant applied to the Social Security Appellate Board ("Appellate Board") that heard the appeal and on 11 July 2017 dismissed the appeal on the ground that the employment injury was not one falling within the meaning of s. 2(6) read together with s. 24(1)(a) of the ESSA.

[5] That did not deter the appellant who took the matter up further on appeal to the High Court as was allowed under s. 91 of the ESSA. The High Court allowed his appeal on 29 January 2020 and set aside the decision of the Appellate Board and further directed for the matter to be reheard before a different panel on whether the "employment injury" is one falling within the meaning of s. 2(6) read together with s. 24(1)(b) of the ESSA.

[6] The Appellate Board reheard the matter again on 17 July 2020 this time on the applicability of s. 24(1)(b) of the ESSA. On 11 September 2020 the Appellate Board again dismissed the appeal and hence the appellant appealed to the High Court at Ipoh.

[7] The Appellate Board held that the accident was not one that happened while the insured was travelling on a journey made for any reason which is directly connected to his employment within the deeming provision of s. 24(1)(b) of the ESSA and thus is not an "employment injury" within the meaning of s. 2(6) of the ESSA and thus the employee is not entitled to or eligible to claim for any temporary disability benefits under the ESSA.

[8] He further appealed to the High Court against the decision of the Appellate Board under s. 91 of the ESSA and the High Court on 22 June 2021 also dismissed his claim on the ground that the injuries suffered are not "employment injuries" as they did not arise out of or in the course of his employment.

[9] The High Court was of the view that s. 24(1)(b) of the ESSA did not apply as the journey from his home in Ipoh to Kulim was not one that was necessary to be performed or undertaken for his work and that it would have

been different if the injury suffered while travelling to work had been from his rented house in Kulim to the factory in Kulim Hi-Tech Park where he worked.

Before The Court of Appeal

[10] The appellant had appealed from the High Court's decision to the Court of Appeal. It was argued that though there was a break in the journey in Kulim from Ipoh to Kulim on a Sunday evening before proceeding to work in Kulim the next day, it was nevertheless a journey undertaken because of his need to work in Kulim.

[11] It was further argued that the ESSA being a piece of social legislation should be interpreted expansively and that any doubt should be resolved in favour of the insured appellant in line with the *ethos* of the ESSA which is to provide social security to workmen insured under the scheme in the event of certain contingencies happening.

[12] The respondent on the other hand argued that there was nothing vague about the meaning of "employment injury" and that the journey from Ipoh to Kulim was not instructed or required by the employer but one that the insured had chosen for his own sake and that the said journey made on a Sunday when it was not a working day was rather remote from work which would only start the next day. This is not a case where the injury had been sustained while travelling to work from his rented house in Kulim to the factory in Kulim Hi-Tech Park.

Principles Of Appellate Intervention

[13] Learned counsel for SOCSO, the respondent here, had reminded this court of the principles of appellate intervention in a case like this. We accept as settled law that the appellate court will not ordinarily interfere with the exercise of discretion of a court of first instance as the initial function of the appellate court is one of review only. It is for the appellant to demonstrate that there had been an error in the exercise of discretion.

[14] We have no quibble with the principle laid down by the Court of Appeal in *ECM Libra Investment Bank Bhd v. Foo Ai Meng & Ors* [2013] 1 LNS 99; [2013] 2 MLJ 35 where it was held at para. [7] that:

> (a) it is well settled that the appellate court will not ordinarily interfere with the exercise of discretion of a trial; court in relation to procedural and/or interlocutory matters (see *Davy v. Garrett* (1878) 7 Ch D 473);
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> (b) the appeal relates to a interlocutory procedural order and exercise of discretion. *It is well settled that in an appeal against the exercise of discretion by a judge, the initial function of the appellate court is one of review only, there being no original discretion vested in the appellate court. It is for the appellant to demonstrate that an error in the exercise of discretion has indeed occurred and it is also one of the categories of cases where appellate interference is warranted* (see *Wah*

Bee Construction Engineering v. Pembenaan Fungsi Baik Sdn Bhd [1996] 3 CLJ 858; *Majlis Peguam Malaysia & Ors v. Raja Segaran a/l S Krishnan* [2002] 3 MLJ 155). (emphasis added)

[15] The Court of Appeal in the case of *Suruhanjaya Pilihan Raya & Ors v. Kerajaan Negeri Selangor & Another Appeal* [2018] 1 CLJ 258; [2018] 2 MLJ 322 cited the Privy Council case of *Ratnam v. Cumarasamy & Anor* [1964] 1 LNS 237; [1965] 1 MLJ 228 (PC) and held that there is a presumption that the lower court judge has rightly exercised his discretion and the appellate court should not interfere unless it is satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way, or where there has been a miscarriage of justice occasioned by the exercise of the discretion.

[16] We shall thus consider if the High Court had erred in applying the wrong principles in interpreting the relevant provisions of the law and in particular s. 2(6), s. 24(1)(b) and s. 24(2) of the ESSA and whether the appellant had been wrongly denied his valid and legitimate claim under the SOCSO scheme.

Whether The Question Of Law Posed Is A Substantial Question Of Law Within The Meaning Of Section 91(2) Of The ESSA

[17] Section 91(2) of the ESSA provides as follows;

> An appeal shall lie to the High Court from an order of an Appellate Board set up by or under this Act if it involves a substantial question of law.

[18] Essentially the question of law posed is whether an employee making his journey back to work on his off-day on Sunday in order to arrive to work at the factory in Kulim Hi-Tech Park on Monday morning would be "travelling on a journey made for any reason which is directly connected to his employment" within the meaning of the deeming provision of s. 24(1)(b) of the ESSA. If it does, then the injury arising out of a commuting accident along that journey is deemed to be an injury that arises out of and in the course of his employment and he would be able to claim for disability benefit arising out of such an "employment injury".

[19] Related to that question would be whether the provision in s. 24(2) of the ESSA applies such as to take the injury sustained outside the deeming provision of s. 24(1)(b) in that there was an interruption of, or deviation from, the insured person's journey when he stayed overnight to sleep at his rented house on Sunday night so as to be able to arrive at the factory in Kulim Hi-Tech Park on Monday by 8am.

[20] We echo and endorse the guidance provided in *Patrick Ho Chang v. Pertubuhan Keselamatan Sosial* [2020] 1 CLJ 284 by Justice Wong Kian Kheong J (now JCA) where a "substantial question of law" pursuant to s. 91(2) of the ESSA was explained as follows:

A [13] ... (v) I accept the interpretation of the phrase "substantial question of law" given in *Rimmalapudi Subba Rao*. There can only be an appeal against a decision of the appellate medical board to the High Court under s. 91(1) and (2) ESSA if an appellant, be it a claimant or the "Organisation" (defined in s. 2(16) ESSA as the Social Security Organisation), can satisfy the High Court that the appeal involves a B "substantial question of law" as follows:

(b) A difficult question of law arises in the appeal;

(c) if the question of law involved is neither important nor difficult, the question is nevertheless a substantial question of law if the question is arguable in the sense that;

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(1) There is room for reasonable doubt on the question; or

(2) There is a difference of opinion on the question;

(d) When a particular set of facts can lead to alternative findings of law, a substantial question of law is involved;

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(e) Where a legal principle or rule to be applied in a case is not well established, there arises a substantial question of law; and

(f) If the appeal concerns:

(1) conflicting decisions of the High Court; or

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(2) conflicting judgments of the Court of Appeal on a question of law and there is no judgment of the Federal Court on the question, there is a substantial question of law involved in the appeal.

I should add that the above examples as a "substantial question of law" F are not exhaustive;

(vi) premised on *Rimmalapudi Subba Rao*, an appeal does not involve a "substantial question of law" if:

(a) the question of law only affects the rights of the parties;

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(c) the question of law can be decided by reference to well- settled general principles of law; and

(vii) the appellant bears the burden to satisfy the court that the appeal concerns a "substantial question of law" in accordance with s. 91(2) H ESSA ...

[21] There are also some conflicting decisions at the High Court level as the discussion below would show. On the one hand, there are cases that seem to suggest that the journey taken should be the journey on a normal work week and not a longer journey on a weekend which journey had not been I ordered by the employer. See the cases of *Wong Yew Loy v. Ketua Pengarah Pertubuhan Keselamatan Sosial* [2010] 5 CLJ 467; *Ketua Pengarah Pertubuhan*

Keselamatan Sosial v. Jusoh Abu Bakar [2003] 1 CLJ 383; [2002] 7 MLJ 17; *Ketua Pengarah Pertubuhan Keselamatan Sosial lwn. Yazmin Mohd Sulaiman* [2018] 8 CLJ 203; [2018] MLJU 282.

[22] On the other hand there are cases that have taken a more expansive interpretation of s. 24(1) of the ESSA and which seem to favour the purposive approach to interpret that particular provision. See the cases of *Ketua Pengarah Pertubuhan Keselamatan Sosial v. Tham Tian Siong* [2008] 8 CLJ 341; [2008] 7 MLJ 854; *Ketua Pengarah, Pertubuhan Keselamatan Sosial v. Mohd Zaili Ali* [2003] 4 CLJ 165; and *Ketua Pengarah Pertubuhan Keselamatan Sosial v. Vadivelan Sandara Saigara* [2008] 9 CLJ 428; [2009] 1 MLJ 238.

[23] There is as yet no reported decision of the apex court on these questions of law. We are satisfied that the "substantial question of law" is patent and that the appeal to the High Court had been properly brought, contrary to what the High Court held in para. [45] of its grounds of judgment that the appeal had failed to cross the threshold requirement of s. 91(2) of the ESSA.

Whether The Accident Was An "Employment Injury" Within The Meaning Of The Deeming Provision Of Section 24(1) Of The ESSA

[24] The appellant had made a claim for "disablement benefit" which is defined in s. 15(b) of the ESSA as follows:

> (b) periodical payments to an **insured person** suffering from disablement as a result of an **employment injury** sustained as an employee under this Act and certified to be eligible to such payments by an authority specified in his behalf by the regulations (hereinafter refered to as disablement benefit). (emphasis added)

[25] It is not disputed that the appellant is an "insured person" within the meaning of s. 2(11) of the ESSA where it is defined as "a person who is or was an employee in respect of whom contributions are, were or could be payable under this Act, notwithstanding that such industry or employee was not so registered, so long as the industry was one to which this Act applies."

[26] He was working as a senior technician for Infineon Technology Sdn Bhd in Kulim Hi-Tech Park and his working hours are from 8am to 5:15pm every day from Monday to Friday. Both he and his employer contribute to the SOCSO scheme under the ESSA.

[27] That being the case the only crucial and critical issue to decide is whether the injury suffered resulting in the appellant's temporary disability was the result of an "employment injury".

[28] Section 2(6) of the ESSA defines an "employment injury" as "a personal injury to an employee caused by accident or an occupational disease **arising out of and in the course of his employment** in an industry to which this Act applies." (emphasis added)

[29] It has been decided by our courts, drawing inspiration from cases in the UK, that the injury caused by an accident need not have happened at the workplace. It may happen outside the workplace for so long as the accident arose out of and in the course of his employment with his employer.

[30] The House of Lords in *Weaver v. Tredegar Iron and Coal Co Ltd* [1940] 3 All ER 157, speaking through Lord Wright observed as follows at pp. 168 to 169:

> **It has long been held that the course of the employment is not determined by the time at which a man is actually occupied on his work**. There may be intermissions during the working-hours when he is not actually working, as, for instance, times for meals or refreshment, or absences for personal necessities. Moreover, the course of the employment may begin or end some little time before or after he has downed tools or ceased actual work. The simplest case is when a man in a large factory or works has to go a substantial distance before he leaves his employer's premises and goes into the public street. As Lord Dunedin said in *Stewart (John) & Son (1912) Ltd v. Longhurst*, at p. 256:
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> > No one, for instance, would doubt that if a collier was injured in the cage on his way to the face at which he was to work that the injury arose in the course of his employment, though the face might be a mile away from the pit bottom; nor would anyone doubt that if the same man were starting from his house in the village and was injured while in the street before he approached the precincts of the colliery the opposite result would be arrived at.
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> Here Lord Dunedin is distinguishing between risks which a man incurs as an employee and those which he incurs as an ordinary member of the public ... (emphasis added)

[31] It was a decision of the House of Lords delivered in May 1940 under a similar provision of the UK Workmen's Compensation Act 1925 in s. 1(1).

[32] Thus, it would ordinarily cover an injury caused in a road accident while the employee is travelling to work or coming back from work. In other words, the work need not have commenced yet but that the travelling to work is part of the requirement to work as in arising out of his employment.

[33] Conversely, his work might have ended for the day but if he is returning to his house after work and an injury is sustained in that journey home, that would also be considered as an injury arising out of his employment.

[34] The rationale is that his travelling to work and returning from work form part of a continuum of his work as in a necessary component of his employment. In short, if not for the work he would not be making that journey to work from his house or from work to his house.

[35] Much has changed since then as travel becomes more convenient along highways and one hardly would have to pass through private properties to arrive at one's place of work. It has come to be recognised that a lot of travelling is done these days on the public roads and highways with respect to travelling to, from and in between work and these new circumstances have to be addressed with respect to the meaning of "in the course of his employment."

[36] Parliament had drafted and included in s. 24(1) a deeming provision, appreciating that travelling in relation to one's work is part and parcel of one's work and a road accident may cause injuries and disabilities that would cause the employee not to be able to perform his work whether temporarily or permanently. Section 24(1) reads as follows:

> Accidents while travelling
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> 24. (1) An accident happening to an insured person shall be deemed to arise out of and in the course of his employment if the accident happens while the insured:
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> (a) is travelling on a route between his place of residence or stay and his place of work;
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> (b) is **travelling on a journey made for any reason which is directly connected to his employment**; or
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> (c) is travelling on a journey between his place of work and the place where he takes his meal during any authorised recess.
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> (emphasis added)

[37] Learned counsel for the respondent SOCSO argued that under s. 24(1)(b) of the ESSA, an accident involving an insured person shall be deemed to arise out of and in course of his employment if the accident happens whilst the insured person is travelling on a journey made for any reason which is directly connected to his employment. It was submitted that the emphasis here is on the word "directly connected".

[38] We see no good reason why a similar emphasis should not be placed on the expression "for any reason" and not merely on "which is directly connected to his employment."

[39] After all, there could be a myriad of reasons for making the journey back to Kulim from Ipoh on an off-day such as the need to properly rest on a Sunday in Kulim to be in a better frame of mind to work on a Monday morning. It could well be to have some work-life balance where time spent with one's family is precious for there is just that window of opportunities to bond with our children after which they "sprout wings and fly away" with a life of their own to lead.

[40] The degree of connection to his employment by his activity would vary but still ultimately related to his employment as he would not be making the journey on a Sunday evening if not for his employment on a Monday morning. Indeed, his employer and SOCSO are not concerned with how he would arrive for work on a Monday morning at 8am at the factory in Kulim save for the fact that he must be there to clock in or report to work.

[41] Be that as it may, the law cannot be so alienated from nor insulated and isolated from the harsh realities of life and the rough and tumble of it all. The realities of life would include for many the need to travel long distances for those who work outstation so that they may be with their families either on weekends or even a mid-week journey home. In the final analysis, the question that ought to have been asked is whether the journey in commuting is made by the employee because of his work and not for other economic or social pursuits.

[42] The reasoning of the Appellate Board, with respect, though clear and crisp, missed the point and had not considered the earthy reality of many a workman in Malaysia in eking out an existence under the Malaysian sun. The relevant part of its deliberations is set out below in its original language:

> [21] Dalam kes ini, keterangan dengan jelas menunjukkan Pemohon telah balik ke Ipoh pada hari Jumaat, 14.10.2016 setelah tamat waktu kerjanya. Pada hari kemalangan, 16.10.2016 beliau dalam perjalanan dari rumahnya di Ipoh untuk balik ke rumah sewanya di Kulim sebagai persediaan untuk bekerja pada keesokan harinya. Seksyen 24(1)(b) AKSP 1969 memperuntukkan "... travelling on a journey made for any reason which is directly connected to his employment". Oleh itu, persoalannya adalah sama ada perjalanan pemohon tersebut dilindungi di bawah peruntukkan ini. Walaupun pemohonan adalah dalam perjalanan balik ke Kulim sebagai persediaan untuk bekerja pada keesokan harinya, panel JRKS berpendapat perjalanan ini tidak dilindungi oleh peruntukan ini memandangkan perjalanan pemohon tersebut dilakukan pada hari cuti minggu pemohon, dengan itu adalah jelas perjalanan tersebut tidak mempunyai kaitan dengan pekerjaanya.
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> [22] Fakta yang penting yang perlu diberi perhatian dan pertimbangan dalam kes ini adalah pemohon telah membuat perjalanan beliau pada hari Jumaat selepas waktu kerja untuk balik ke Ipoh dan perjalanan ini langsung tiada kaitan dengan pekerjaannya sebaliknya ianya adalah satu perjalanan yang dibuat semata-mata atas urusan peribadi, maka perjalanan balik dari Ipoh ke Kulim juga adalah satu perjalanan untuk tujuan peribadi dan langsung tiada kaitan dengan penggajiannya.
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> [23] Selain itu, panel JRKS juga berpendapat peruntukan Seksyen 24(1)(b) AKSP 1969 adalah bertujuan untuk melindungi pekerja yang perlu melakukan apa jua perjalanan bagi maksud melaksanakan tugas beliau sekiranya perjalanan tersebut adalah berkaitan dengan penggajian pekerja tersebut ataupun untuk memberi perlindungan kepada pekerja yang dalam perjalanan untuk melakukan tugasan sepertimana yang diarahkan oleh majikannya.

[24] Dalam kes ini keterangan juga dengan jelas menunjukkan perjalanan Pemohon dari rumahnya di Ipoh ke rumah sewanya di Kulim bukanlah satu perjalanan yang dilakukan atas arahan majikannya, sebaliknya seperti yang dinyatakan sebelum ini, perjalanan tersebut lebih berbentuk peribadi. Pemohon dalam keterangan menyatakan beliau bekerja di Kulim dan untuk maksud tersebut telah menyewa rumah di Kulim untuk berulang alik ke tempat kerjanya. Dengan itu "place of residence" atau "place of stay" beliau adalah di rumah sewanya di Kulim. Rumah di Ipoh bukanlah rumah atau tempat tinggal untuk tujuan berulang alik ke tempat kerja setiap hari, sebaliknya ia lebih kepada rumah di hujung minggu sahaja.

[43] We are of the considered view that the appellant's journey from his place of residence in Ipoh, where he stayed with his family during the weekends starting Friday night to Sunday evening, back to Kulim in Kedah on Sunday evening, was clearly a journey made which is "directly connected" to his employment, following which the deeming provision of s. 24(1)(b) of the ESSA would apply.

[44] There is no requirement that the employer must have instructed him to make the journey. Indeed, an employer would not generally bother about where the employee stays or how long it takes for the employee to make the journey to work for so long as the employee arrives for work punctually.

[45] The relevant question to ask is whether the journey is "for any reason" which is "directly connected to his employment" within the meaning of s. 24(1)(b) of the ESSA as in whether it is necessary for him to make that journey. In other words, had it not been for his employment would he have made the journey. We would respectfully say that the said journey from Ipoh to Kulim on a Sunday was necessary for him to arrive at Kulim for work the next day, after having rested a night in his rented place of stay in Kulim.

[46] Surely there is nothing unusual and everything to be encouraged for an employee who works outstation to be returning home to his family for the weekends and to want to return to work the evening before the next day so that he could go to the factory on a Monday morning, fresh and alert and ready to work after having fully rested that Sunday night.

[47] It is not disputed that that is the journey he had been accustomed to making for a long while and it had become a routine for him where his work is concerned. This court can surely take judicial notice of the fact that many who have to seek employment outstation or are transferred outstation would make their journey back home to be with their families during the weekends.

[48] It was a journey that the appellant would not have needed to make if not for the fact of his work in the factory of his employer in Kulim. It was submitted by the respondent that his employer did not instruct him to make that journey home after work on Friday from Kulim to Ipoh and correspondingly when he made that journey on a Sunday evening from Ipoh to Kulim, it was at his own behest and for his benefit.

[49] We cannot interpret the law divorce from and independent of the realities of life. The reality of life is such that wherever one lives, one does not parachute to be at one's place of work at the appointed time in the morning on a workday. A journey has to be made from one place of residence or stay. There is nothing preventing one from staying with one's family in one's permanent place of residence and travelling outstation for work the next day, *albeit* the journey would be more tiring and perhaps leave one rather tired upon arrival at work.

[50] Assuming the appellant had taken that journey on a Monday early morning from Ipoh to Kulim direct to the factory and the accident had happened along that journey, would he not be entitled to claim from SOCSO? He would certainly be allowed to as that was a journey made from his place of residence to his place of work in Kulim. Why then should he be disqualified merely because he started the same journey on Sunday evening to Kulim so that he could rest for the night in Kulim and then from there make his journey to the factory the next day? Or for that matter what if he had rested in the rest and recreation area along the North-South Highway for the night to save on accommodation and continued with the journey direct to the factory the next day in the early hours of the morning of the Monday?

[51] There are just so many possible permutations in life such that unless the journey made is far remote and removed from his work and employment, one can safely say that a journey undertaken from one's place of residence during a weekend to one's place of stay for the weekday in another town to go to work the next morning, fresh and alert, would ordinarily be a travelling on a journey made for any reason which is directly connected to his employment such that the deeming provision of s. 24(1)(b) of the ESSA is triggered, deeming the injury caused during such a journey to be an "employment injury".

[52] Thus, one can appreciate the remote nature of the travel if earlier on that Sunday the appellant had brought the family for a holiday in historical Melaka and an accident happened in Seremban on that way home to Ipoh before the continuation of the journey to Kulim. In such an instance, it may be argued that the journey from Ipoh to Melaka and Melaka back to Ipoh was not a journey that had to be made in the course of his employment with his employer.

[53] In cases where housing accommodation or quarters are provided by the employer so that there may be less of a need to travel back to one's home in another state that frequently, perhaps it may be argued that the relevant journey would be from the quarters provided by the employer to the place of work.

[54] We are not unaware of the High Court case of *Wong Yew Loy v. Ketua Pengarah Pertubuhan Keselamatan Sosial* [2010] 5 CLJ 467 where the employee's claim utilising the deeming provision of s. 24(1)(a) of the ESSA

was rejected by the Appellate Board and affirmed in the High Court. The factual matrix is different in that there the employer had provided housing accommodation in the quarters for its employees. The employee there had stated that it was from the house in Taman Putra Perdana in Puchong, Selangor that he would commute to and from work every day; his work being at the employer's ceramic factory in Puchong itself.

[55] He had also stated that he would return to Jelapang in Perak only on festivals and/or leave days and when it is a public holiday. The High Court was persuaded that his stay at his residence in Jelapang is purely to visit his family or for a break and cannot be said to be a place of residence in which he intended himself to commute to and from work every day.

[56] Unlike the instant case, there was no routine or pattern of travel from his home in Jelapang to his factory in Puchong in a case where accommodation had been provided for him in Puchong itself. In the instant case, it was a case where the employee would make his journey every Sunday evening from Ipoh where he stayed with his family for the weekends to Kulim where he stayed in his own rented house so as to be able to reach his factory in Kulim ready for work on Monday morning after having rested for the night.

[57] His employer had not provided him with any quarters though we seriously doubt whether that should make any material difference to disentitle such an employee to claim for disability benefit arising from a commuting injury suffered during the journey made. In the instant case, even if he had wanted to commute daily or every alternate day from Ipoh to Kulim, that is also manageable and his choice. After all, it is only about 150km and one should comfortably make the journey in one hour and 45 minutes.

[58] It may be that for a claim resting on s. 24(1)(a) in travelling on a route between his place of residence or stay and his place of work, the fact of housing accommodation provided by the employer may lend some weight to SOCSO treating the journey to be from the housing accommodation to the employee's place of work, depending on the circumstances of the case.

[59] The case of *Ketua Pengarah Pertubuhan Sosial v. Jusoh Abu Bakar* [2007] 7 MLJ 17 had earlier followed the same approach in a claim under s. 24(1)(a) of the ESSA. There the insured left his residence by motorcycle at Telok Ketapang, Kuala Terengganu to go to his rented house at Paka in Dungun to change his uniform before he proceeded to his work at the airport in Kertih. On his way to his rented home at Paka, the insured met with an accident.

[60] The High Court held that the accident was not an employment injury under s. 2(6) of the ESSA as the insured's Ketapang house was in law, not his place of residence or stay in relation to his place of work for the purpose

of s. 24(1)(a) of the ESSA as the place was not the insured's home or base from where he went to work daily. The Ketapang house was his weekend retreat.

[61] Therefore, the High Court held that the insured's journey from his residence at Ketapang to his rented house at Paka on that fateful day cannot be considered as if he was travelling on a route between his place of residence or stay and his place of work as his place of residence or stay is not the rented house at Paka.

[62] That case was a decision under s. 24(1)(a) of the ESSA and in that case, the employer had provided its motor van to pick the employee up from Paka to his workplace at the Kerteh airport.

[63] See also the case of where the decision of the High Court in *Ketua Pengarah Pertubuhan Keselamatan Sosial lwn. Yazmin Mohd Sulaiman* [2018] 8 CLJ 203; [2018] MLJU 282 which appeared to have been influenced by the fact that the employer had rented an apartment for the employee and so his travel from his family house in Subang to his place of work was not a journey made under s. 24(1) as the journey from his family house is not a journey from the place of residence or stay to his place of work. The decision was made under s. 24(1)(a) of the ESSA.

[64] On facts not dissimilar to the case of *Wong Yew Loy* (*supra*), another High Court in *Ketua Pengarah Pertubuhan Keselamatan Sosial v. Tham Tian Sion* [2008] 8 CLJ 341; [2008] 7 MLJ 854, where an employee returning to his home in Sibu for his five-day leave at the end of every month from his place of work at a logging camp in Putai, Sarawak where he was provided lodging with workers' quarters, and suffered injuries when their vehicle was involved in an accident, had earlier held that the commuting injury sustained was an employment injury and as such the employee could claim under the ESSA.

[65] To return to his home in Sibu from the logging camp at Putai, he had first to travel to the Putai wharf to board a ferry to Kapit and from there to take an express boat to Sibu before finding his way home. The road accident took place on that stretch of the journey home from the logging camp in Putai to the Putai wharf. The appellant disputed the claim but the Appellate Board allowed the claim and it held, among others, that: (i) the accident arose out of and in the course of his employment because the journey was made for a reason which was directly connected to his employment; and (ii) a reasonable period should be allowed before and after work hours before it could be said that the respondent ceased to be in the course of employment.

[66] The High Court in dismissing the appeal of SOCSO said at p. 865 that in determining whether the accident attracts s. 24(1)(b) is: "to find out what is the primary purpose of the employee's movement or travel – Is it work

related or is it one where the accident would not have happened if he was not in employment (all things being equal) are some of the factors which need to be considered and need not be the only factors."

[67] The High Court further held as follows at p. 866 in reminding SOCSO of its social obligation under the ESSA:

> In this case the Board has rightly construed the phrase 'directly connected' and such a construction cannot be reasonably faulted. Parliament will never have intended for an employee not to be protected under the scheme when the respondent was under employment and 'which is directly connected to his employment'. It is abhorrent to notions of justice and fair play for the appellant, a statutory body to sought strict interpretation of social legislation and attempt to defeat the legitimate expectation of the public and in particular the employees.

[68] Likewise, in the instant case, the leave on Saturday and Sunday was the appellant's entitlement under his contract of employment and his going home to spend time with his family is what every employer would encourage. After all, a man as the head of the family would have to carve out time to bond with his wife and children. He is a happy man who has a happy family. A happy man is a more productive and committed worker at his workplace with a better focus at work.

[69] A man's best investment is still to invest time and energy into his family and to make deposits, as they say, into the emotional bank account of his wife and children. We would be so bold to say that every employer would encourage its employee to build a strong and stable family as part of its corporate social responsibility to its stakeholders which would certainly include its employees.

[70] His travel on a Friday evening to his place of residence in Ipoh is a travel "directly connected" to his employment for it is his rest on Saturday and Sunday and his default decision is to spend that time to travel home to be with his family. After all rest and work are intertwined and one cannot exist without the other for otherwise one would be unproductive at the workplace with no rest and being away from the family for too long.

[71] His travelling back to Kulim on a Sunday evening from Ipoh is very much "directly connected" to his employment for if not for his working in Kulim, he would not have needed to make that journey from Ipoh to Kulim.

[72] To artificially dissect his journey to saying that his travelling from Kulim to Ipoh was after working hours and not "directly connected" to his employment would be to ignore the fact that he was entitled to a weekend leave every week for which he can and should validly utilise to travel home to Ipoh to see his family and spend time with them. Supposing he has met with a road accident on that stretch of the journey home after Kedah and past Butterworth, would he not be covered? Or is SOCSO going to argue that we

would only cover him under the scheme if his injury is suffered within Kulim and once he is outside Kedah, he is no longer covered though that has been his journey home to Ipoh on a Friday evening after work?

[73] Likewise, are we going to say that his journey back to Kulim from Ipoh is not covered unless he has already crossed the border of Kedah after Butterworth and not before? In these days of modern communication along the highway in a less than two hours journey, it would be rather pedantic and pharisaical to pursue such an artificial distinction devoid of present-day realities.

[74] We are thus of the considered view that the High Court had erred when it concluded at para. [28] of its ground of judgment that "berasaskan kepada pemerhatian dan pendirian JRKS di atas, mahkamah ini berpendapat bahawa s. 24(1)(b) AKSP 1969 adalah bertujuan untuk melindungi para pekerja yang membuat perjalanan bagi tujuan kerja dan atas arahan majikan".

Whether The "Employment Injury" Within The Meaning Of The Deeming Provision Of Section 24(1) Of The ESSA Was Nevertheless Excluded Under The Proviso In Section 24(2) In An Interruption And Deviation From The Journey

[75] Things get a bit trickier when there is a substantial or material interruption in the journey. Would the interruption in the journey or a deviation from the journey take the employee to outside the pale of protection afforded by the ESSA? That is where the exception to the deeming provision has been drafted in s. 24(2) of the ESSA to delineate the limits of coverage under the insurance scheme and the protection provided for.

[76] Section 24(2) reads as follows:

> (2) **If the accident** under subsection (1) **occurs during any interruption of, or deviation from, the insured person's journey** made for any of the purposes stipulated in the same subsection, the accident **shall not be deemed to arise out of and in the course of his employment**.
>
> (emphasis added)

[77] If the exception to the proviso applies, all that it means is that the deeming provision does not apply in which case one must then prove how the injury suffered from the accident is still an employment injury. In other words, without the aid of the evidential assistance of a conclusive finding by way of deeming the injury caused by the accident to be an "employment injury", one has to prove in the ordinary way that the injury is an "employment injury."

[78] After all, the "deeming" provision is only an aid to proving "employment injury" especially when it relates to injuries suffered while commuting and the employee is always at liberty to prove "employment injury" without having to rely on the evidential assistance afforded by the "deeming" provision.

[79] The employee would then have to fall back on what decided cases on the meaning of "employment injury" in a similar scheme have held, whether in our jurisdiction or other similar jurisdiction where there is a no-fault liability for compensation under a compulsory social security scheme for employees. All it means is that the employee would have to establish that the injury is "employment injury" independent of s. 24(1) of the ESSA.

[80] By way of analogy, we are familiar with the most common ground for a petition to wind up a company namely under s. 465(1)(e) of the Companies Act 2016 which is that "the company is unable to pay its debts". There is a deeming provision on inability to pay its debt as a ground for winding up a company under s. 466(1)(a) of the Companies Act 2016 which reads:

> 466. (1) A company shall be deemed to be unable to pay its debts if:
>
> (a) the company is indebted in a sum exceeding the amount as may be prescribed by the Minister and a creditor by assignment or otherwise has served a notice of demand, by himself or his agent, requiring the company to pay the sum due by leaving the notice at the registered office of the company, and the company has for twenty-one days after the service of the demand neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor;

[81] Whilst commonly a 21-day notice is given by leaving at the registered office of the company by a creditor and after the lapse of 21 days, if the company has not secured or compounded the debt to the satisfaction of the creditor, then the deeming provision would kick in.

[82] However, that is not the only way of proving a debtor company's inability to pay its debts. The petitioner may show the winding up court that based on the accounting record of the company where its assets and liabilities are concerned, its cash flow and bank statement and the fact that other supporting creditors have not been paid, it may still be conclusively proved that the company is unable to pay its debt.

[83] In *Cooper & Dysart Pty Ltd v. Sargon* (1991) 4 ACSR 649 at p. 665, the Supreme Court of Western Australia in interpreting the application of the deeming provision of "inability to pay its debts" in s. 553(2)(a) and (b) of the Companies (WA) Code which is not materially different from our s. 466 of our Companies Act 2016 commented as follows:

> In *Pearce and Geddes Statutory Interpretation in Australia*, 3rd ed, the authors at pp. 85 and 86 state:
>
> > This use of the expression 'deemed' was described by Griffiths CJ in *Muller v. Dalgety & Co Ltd* (1909) 9 CLR 693 at 696 as a 'statutory fiction'; a device for extending the meaning of a term to a subject matter which it properly does not designate. When 'deemed' is used in this way, Griffith CJ pointed out that it is important to consider the purpose for which the fiction has been introduced.

A

> Care must be taken to observe that the extended meaning of the word is applied but equally the reader must be aware that it is a fictitious use of the word and is only applicable in its particular context.

> In my opinion, notwithstanding the use of the words in s. 553(b) "and only if", the wording of the section does not exclude other means of establishing that a company is unable to pay its debts. I say this because **in the context of this legislation the use of such a deeming provision is to extend the meaning of the term. It does not exclude proof of the basic facts in any other appropriate manner**. (emphasis added)

[84] Thus, the employee may rely on the case of *Weaver v. Tredegar Iron & Coal Co* [1940] 3 All ER 157 where the House of Lords in UK interpreted the expression "course of employment" liberally and expansively as follows:

> ... if duty be construed with ... sufficient width, it may be a decisive test, but so construed, to say, that the man was doing his duty means no more than that he was acting within the scope of his employment. **The man's work does not consist solely on the task which he is employed to perform. It includes also matters incidental to that task**. Times during which meals are taken, moments **during which the man is proceeding towards his work** from one portion of his employer's premises to another, and period of rests may all be included. Nor is his work necessarily confined to his employer's premises ... The question is not, I think, whether the man was on the employer's premises It is rather **whether he was within the sphere or area of his employment**. (emphasis added)

[85] Even in this regard, the ESSA being a social legislation, Parliament had given an evidential device in favour of the employee by allowing him to invoke a presumption contained in s. 23 as follows:

> **23 Presumption as to accident in the course of employment**
>
> For the purposes of this Act, an accident arising in the course of an insured person's employment shall be presumed, in the absence of evidence to the contrary, also to have arisen out of that employment.

[86] Therefore, in the absence of evidence to the contrary as may be adduced by SOCSO, the evidence of the employee on the necessity for his commuting for work purpose is such that an accident that happened during the course of his employment is presumed to be an accident arising out of that employment too so as to satisfy the test of an "employment injury" within the meaning of s. 2(6) of the ESSA.

[87] Clearly by "any interruption of or deviation from" the journey must mean a substantial interruption or deviation arising out of some other economic pursuit. The ease of modern day, travel by road is such that a detour may sometimes be necessary to attend to some matters which do not transform the character of the journey to some other pursuits, be they economic or social.

[88] Thus, if one stops for a while in the rest and recreation area for a cup of coffee in Nibong Tebal, such an interruption in the journey would not take the journey outside the scope of protection under the insurance scheme. Even if one were to make a break in the journey in Taiping and stay for a night before continuing on the journey to Kulim, would not be an interruption or deviation from the permitted journey.

[89] If one interprets "interruption" and "deviation" to be any interruption and deviation, then one can still argue that the interruption or deviation is necessary because of the need for rest or to answer nature's call and thus still falling within the meaning of "employment injury" without relying on the deeming provision.

[90] However, one may also interpret "interruption" and "deviation" to exclude minor interruption and deviation for the law does not have time and is little concerned with *de minimis* matters in that it has no time for trivialities. So long as the journey is one continuum journey, a minor break or deviation does not take one outside the scope of protection.

[91] In *Tham Tian Siong*'s case (*supra*) the High Court in interpreting s. 24(1)(b) ESSA held as follows:

> [10] It is incumbent upon an employee to travel from his home to the workplace and from the workplace to his home. It is my judgment that such commuting will fall within the phrase 'connected'. During such commuting some deviation to have a cup of tea or to buy grocery or to stop at a friend's house does not necessarily mean that it is not directly connected to the employment. It all depends on the facts ...

[92] We would say respectfully that from the facts in the instant case, the interruption or deviation, even if the stopover at his rented place of stay in Kulim for the night is considered one, that does not make the journey to be one totally unrelated or unconnected to his employment or outside the scope of coverage under the SOCSO scheme.

[93] If the appellant had decided to make a journey to work on the early morning of the Monday direct to the factory in Kulim from his home in Ipoh, and an accident should have occurred that resulted in an injury, we would have no difficulty saying that the injury is an "employment injury" as the journey is necessary for the work he is scheduled to do in the factory on a Monday morning at 8am and the nexus or connection to his work is such that one may comfortably say it is an injury that arose "in the course of his employment."

[94] In the case where evidence had been led that it had become his routine to travel back to Kulim on a Sunday evening so that he would be able to rest in his own rented place of stay in Kulim on Sunday night and then to proceed to work in the factory in Kulim on a Monday morning, a break in the journey

A does not make the journey from Ipoh to his rented house in Kulim on a Sunday to be transformed into a journey totally unrelated to his employment such that it is no longer "in the course of his employment".

[95] There was no other reason for making that journey back to Kulim on a Sunday other than to properly rest on the Sunday night so as to arrive fresh and rejuvenated for work on a Monday.

[96] Both the "necessity" test and the "nexus" test would operate to form a continuous and complete commuting to work and for no other purpose as in other economic pursuits. The "necessity" is in the need to commute to work taking into account that many have to work outstation to support the family back home where the rest of the family members would stay and have their studies in the nearby school for a growing family.

[97] The "nexus" would be that there is no long unexplained break in the journey for the only sensible thing to do on a Sunday night after the journey from Ipoh to Kulim is to rest for work the next day. It is not a case where he had made the journey back to Kulim on a Saturday so that he could perhaps attend to many other personal matters on a Sunday.

[98] This is not the case where the employer had rented a house in Kulim for the employee so as to ease his commuting to and from work or where there is a company vehicle provided from a pickup point in Kulim to the factory in Kulim. Even if that had been the case, we do not think the circumstances of the instant case would take the appellant outside the pale of protection under the SOCSO scheme under the ESSA.

[99] The reality of modern day commuting along a much-improved system of roads and highways is such that many employees do travel during weekends to be with their families which is something to be encouraged both by the employer and the Government as part of the need to bond with one's spouse and children. Nobody wants an accident to happen and when it does happen, the only question is whether the journey is for the purpose of commuting to or from work as in is it work-related as in is it arising "in the course of his employment."

[100] The approach should be how best to allow the insured employee to claim and not how best he could be excluded from claiming under the SOCSO scheme now that he has suffered an injury that disabled him from being able to work, whether temporary or permanently. For so long as it is not an economic or enjoyment pursuit as in a holiday but that the commuting is necessary for work in the way the employee has so arranged his routine, we do not think he should be left high and dry when an accident should happen that caused him to suffer an injury.

[101] Such an injury would be work-related and an "employment injury" within the meaning of s. 2(6) of the ESSA, entitling him to make a claim for the disability suffered as a result. Such a claim is not going to denude or

deplete the SOCSO fund in any substantial way as contributions are now made compulsory covering both local and foreign workers on almost all industries in Malaysia and even now extending to self-employed in some sectors.

[102] The concept is to create a pool of funds that are to be properly invested and managed so that the risk is spread out and when eventualities do happen as it would surely do in the exigencies and contingencies of life in an imperfect world, there is some safety net for some succour while one struggles to rehabilitate and recover to get back to work again. As the Malay proverb would ring true, "malang tidak berbau" which translated dynamically, underscores the reality that we often cannot foresee an accident coming as there would be no whiff of it, much less the odour of disability and hopefully not death.

Whether There Is An Ambiguity In The ESSA With Respect To The "Employment Injury" Suffered That Would Constrain The Court To Apply The Purposive Interpretation

[103] It cannot be denied that the ESSA is a piece of social legislation designed to protect the employees who may not have the means to have their own insurance coverage or personal accident policy. The insurance scheme makes it compulsory for all employees earning more than RM4,000 per month in whatever industry in the private sector to be compulsorily covered.

[104] It provides for a no-fault liability and thus the amount is payable depending on the type of disability suffered irrespective of whether the employee had himself being negligent or contributorily negligent or not negligent at all. It is thus time-saving as there is no need to prove that someone else had been negligent or that the injury is not one's fault. The legislation is thus designed to assist the employee when he needed it most in the event that he could not work temporarily or permanently because of the disability suffered as a result of an employment injury.

[105] Section 17A of the Interpretation Acts 1948 and 1967 encapsulates and enjoins the purposive interpretation of an Act and more so a social legislation. It reminds us as follows:

> 17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object,

[106] Thus, in *Ketua Pengarah, Pertubuhan Keselamatan Sosial v. Mohd Zaili Ali* [2003] 4 CLJ 165 it was observed by the High Court with a heavy dose of reality and reasonableness as follows:

> If one were to apply the literal meaning to the words "interruption of or deviation from the insured person's journey" appearing in s. 24(2), a worker would be disqualified from making any claim even if he has to

attend to the call of nature some distance from the highway in the course of his journey as he would then be guilty of having interrupted or deviated from his journey – an absurdity that could not have been intended by the legislature.

Section 24(2) of the Act must therefore be subjected to **the purposive interpretation pursuant to s. 17A of the Interpretation Act 1948 and 1967** which provides as follows:

> 17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object. (emphasis added)

[107] In the above case, Mohd Zaili Ali met with an accident while he was riding his motorcycle to return home from work. He was carrying a co-worker as a pillion and it has been his practice since starting work with his present employer then to share the motorcycle with his co-worker. The route he took at the time of the accident was the very same route that he had been taking all along. As a matter of routine, he would deliver his colleague back to his own house on the next road running parallel to the road where he resided.

[108] His injury had been sustained in an accident that happened when he was sending his co-worker home but SOCSO rejected his claim on the ground that he had deviated from his journey to send his co-worker home under s. 24(2) of the ESSA.

[109] The Appellate Board of SOCSO agreed with him and allowed his appeal. The reasoning of the Appellate Board is both succinct and spot on as follows at p. 168:

> The Board would have held in favour of SOCSO but for one very significant factor. The insured person started work just six months before the accident. It is the uncontradicted testimony of the insured person that ever since commencing employment he had always been accompanying his colleague on the journey to their common place of work at FM Feedmill Sdn Bhd. The route he had taken on the date of the accident was the very same route he had taken to work all this while. The accident occurred on the said route. In these circumstances the Board sees no reason to hold that he had deviated from the route between his place of residence and his place of work. It would have been a very different thing altogether if the insured person had proceeded out of his way to fetch a friend or relative residing in a different locality and working with another employer at another place. In the alternative situation postulated the Board would have no difficulty in holding that the accident occurred during a deviation from the route between his place of residence and his place of work. The Board might also add here that nothing in the Act requires the route between the place of residence and the place of work to be the "direct" or "shortest" route between the two points.

[110] The High Court in dismissing the appeal of SOCSO, gave a much broader interpretation of s. 24 of the ESSA. The High Court was of the view that it matters not whether he had been taking the "very same route he had taken to work all this while" as the learned Chairman had found, or had taken any other route to reach his destination. The learned High Court Judge Kang Hwee Ghee J (later JCA) astutely observed as follows at p. 169:

> The chairman's finding however, appears to have been premised only on a narrow interpretation of s. 24 of the Act.
>
> But s. 24 is amenable to a much wider purposive construction.
>
> To appreciate the scope of s. 24(2) of the ESSA 1969 one must be able to appreciate the elementary principle of economics that in the small and medium enterprise, labour (in the present context, the worker) constitutes an important factor of production.
>
> Unlike the entrepreneur (in the present context, the employer) who takes profits for his enterprise, the worker takes remuneration for work performed. His resource must necessarily be limited by the pay he takes home. His wellbeing while being employed has to a limited extent to be provided for by legislation. Hence the ESSA 1969 – which provides under s. 24(1) a liberal insurance coverage in respect of injuries sustained by the worker in the course of his employment.
>
> It follows therefore the exclusionary provision under s. 24(2) of the Act must be subjected to the purposive construction that it deserves in line with the objective to provide the worker with the widest possible insurance coverage of his welfare to ensure continuity of production.

[111] We agree that the purposive approach is a proper and right approach to take in interpreting the provisions of a piece of social legislation where the intent of the statute is to protect the employee from untoward injuries suffered arising out of or in the course if his employment. Such an approach is to be taken more so when there is ambiguity as to the type of interruption and deviation that is envisaged.

[112] We find the "economic pursuit" test as a neat test to determine if the proviso in s. 24(2) would be engaged in taking the employee outside the scope of the coverage under the ESSA. It is only when the interruption or deviation is for some other economic pursuit distinct and unrelated to the employment that an injury suffered in an accident during such an interruption or deviation would fall outside the scope of coverage under the SOCSO scheme of no-faulty liability.

[113] The test and the helpful examples illustrating it are reproduced below at p. 170:

> In my view a worker unlucky enough to meet with an accident while going to or returning from work should be able to make a claim under s. 24 even if he had interrupted or deviated from his journey for any reason whatsoever if the objective of his travel is to reach his place of work or

A to return home from work, provided the deviation or interruption was not made in furtherance of some other economic pursuit distinct and unrelated to his obligation under the contract of employment he had entered into with the employer – as for instance he had in the course of the journey made a deviation or interruption to undertake another remunerative part-time work – for here it is clear that the worker was
B under the circumstances undertaking a distinct and unrelated pursuit that could not have served the interest of his employer to whom he was committed to work for and who in turn had provided for his insurance under the Act.

On the other side of the coin he should be held covered even if he had
C interrupted his journey home from work to visit a sick relative at the hospital or if he had stopped at the market to purchase provisions for it cannot be gainsaid that the main objective of his journey was to reach home and was not made in furtherance of any other economic pursuit other than the one which he was already committed to with his employer.

D Now to revert to the issue in the instant appeal. It would not have mattered that the worker had made a detour to send a co-worker home. *He should be able to make the claim given that the objective of his travel was to return home and the deviation or interruption of the journey was not made in furtherance of some other economic pursuit distinct and unrelated to the employment he had committed himself to with the employer.* (emphasis added)

E **[114]** In *Tham Tian Siong*'s case (*supra*) the High Court in interpreting s. 24(1)(b) ESSA purposively commented as follows:

[9] ... (a) It cannot be disputed that ESSA 1969 is primarily aimed to protect employees and among others to provide with benefits within their Scheme of insurance. In essence it is a social legislation. Social legislation
F must be liberally construed and in almost all cases the court is likely to lean in favour of the beneficiary provided it does not violate any provisions of the Act ...

[115] The High Court in *Ketua Pengarah Pertubuhan Keselamatan Sosial v. Vadivelan Sandara Saigara* [2008] 9 CLJ 428; [2009] 1 MLJ 238 sounded
G the same resonance in applying the purposive approach to interpreting the ESSA as follows:

[16] ... It is important to be reminded that this social legislation was introduced to secure social and economic justice to all insured-employees under this Act who are entitled to claim the benefits with the view to
H provide a quick and inexpensive remedy for the entitlement of such rights for which they are required by the Act to contribute monthly towards the fund in the event of risks of service. In fact, the contribution contemplated by the Act is in the nature of social insurance or security and provides certain contingencies and the contribution received from the employer or the insured is deposited in common fund and managed by SOCSO. The
I law therefore must respond and be responsible to be felt and discernible compulsion of circumstances that would be equitable, fair and just and unless there is something to the contrary in the statute, the court must

take cognisance of that fact and act accordingly (see *Pomal Kanji Govindji v. Verajall Kar Sandas Purohit* AIR 1989 SC 436). Therefore, it is not unreasonable and is a sound rule of construction that the social legislation should be interpreted liberally and be given a purposive interpretation and in such a manner as to render the rights and benefits available under the Act to be effective and meaningful or to provide a meaningful social security to Insureds or their dependants and not to 'put up all sorts of barricades along the path'. Law should keep pace with changing socio economy norms especially if the existing law does not suit the present context or is inadequate (see *MC Mehta v. Union of India* AIR 1987 SC 1088).

...

[30] ... This social legislation protects employees of almost all private sectors against contingencies of industrial accidents or occupational disease 'arising out of and in the course of his employment' and disablement or death due to whatever cause and provides monetary assistance or benefit through the Act of the compulsory social insurance scheme and this court or SOCSO itself should not frustrate or deprive insured or their dependants of their benefit by giving a narrow or restrictive interpretation of s. 24 of the Act unless there is evidence of any kind of fraudulent claims which was not the case in this instant appeal. The board must be given the liberty to give a liberal interpretation to s. 24 of the Act to do justice.

[116] Even if the purposive approach to interpreting a statute should only be confined to cases where the words used in a particular section of an Act are not clear or susceptible to more than one interpretation, we would respectfully say that the expressions "arise out of and in the course of his employment" and "travelling on a journey for any reason which is directly connected to his employment" in s. 24(1)(b) of the ESSA would fall into that category of cases.

[117] The problem here is not so much the inherent infirmities in the expressions and words employed, but rather that the concept of employment is a very dynamic one and the face of work has changed tremendously with new concepts like the mobile worker and the rise of digital nomad workforce coupled with recent changes in the new concept of work from home and remote work. It is a question of degree of connection to work and is always fact-sensitive and fact-centric bearing in mind one's practice, routine and the ordering of one's affairs within the over-arching purpose of being productive at work.

[118] We do not think the more expansive and reality-based approach housed within the purposive approach in interpreting statute would offend the principle laid down by the Federal Court in *All Malayan Estates Staff Union v. Rajasegaran & Ors* [2006] 4 CLJ 195; [2006] 6 MLJ 97 as follows when propounding the purposive approach to interpretation:

In summarising the principles governing the application of the purpose approach to interpretation, *Craies on Legislation* (8th Ed) says at p 566:

> (1) **Legislation is always to be understood first in accordance with its plain meaning**.
>
> (2) **Where the plain meaning is in doubt**, the courts will start the process of construction by attempting **to discover, from the provisions enacted, the broad purpose of the legislation**.
>
> (3) **Where a particular reading would advance the purpose identified, and would do no violence to the plain meaning of the provisions enacted, the courts will be prepared to adopt that reading**.
>
> (4) Where a particular reading would advance the purpose identified but would strain the plain meaning of the provisions enacted, the result will depend on the context and, in particular, on a balance of the clarity of the purpose identified and the degree of strain on the language.
>
> (5) Where the courts conclude that the underlying purpose of the legislation is insufficiently plain, or cannot be advanced without any unacceptable degree of violence to the language used, they will be obliged, however regretfully in the circumstances of a particular case, to leave to the legislature the task of extending or modifying the legislation. (emphasis added)

[119] With SOCSO itself encouraging and even making it compulsory for self-employed in certain sectors to contribute towards and be covered under the SOCSO scheme under the Self-Employment Social Security Act 2017, the traditional concept of employment where work ordinarily does not begin until one reaches the workplace can no longer hold true. Likewise, the previous reality of work ending when one leaves the office is no longer true for the global digital nomads.

[120] The traditional paradigms of work have now been transformed to a more dynamic concept of employment and work-related activities where it is not uncommon to check and even draft work-related emails on the iPad or other electronic device while one is commuting or to communicate with one's mobile phone *via* a WhatsApp chat group set up with one's colleagues or superiors and subordinates. One may even be collaborating on a document shared with other colleagues in iCloud or Google Drive. In fact, for increasingly many people, their substantial work is done often from home or remotely from wherever they may be including commuting by road, rail or plane. It would not be far-fetched if an injury suffered at home is now claimable because of one is working from the home *via* technology such as Zoom, Skype or Webex meetings.

[121] It has been suggested by the respondent SOCSO that to allow the claim would open the floodgates for employees to make a claim no matter how remote the journey is to the employment of the insured. With respect, we do not think so. It would be rather strange for those making their way to work with the intention of arriving near the workplace a night earlier to arrive in the workplace fresh and alert, to be more prone to a commuting accident along the way. If at all these are people who do not like the idea of having to rush to work on a Monday morning and are responsible to prepare and get ready for the week's work by getting enough rest for the Sunday night. At any rate there are no empirical statistics to show that we would be exposing SOCSO to an avalanche of claim if the provision of s. 24(1) of the ESSA was to be interpreted more expansively and less restrictively and narrowly.

[122] Even in the unlikely event that there is a spike in the claim, that problem if it should arise, as in stretching the funds of SOCSO, has to be tackled at a separate level and not in depriving the injured employee of his compensation and benefit to which he would have a legitimate expectation and claim.

[123] It is a fact that commuting accidents happen even to the most careful of us and sometimes it may not be due to our negligence but that of some other road users and vehicles. It is something that no one would wish it should happen to them or to anyone for that matter. Hence the safety net support and succour of a no-fault liability claim under the SOCSO scheme.

[124] We must commend SOCSO for coming up with its motto, written in its correspondence with contributors, as being both apt and appropriate, as representing its care and concern for all its insured. Indeed, it resonates with all, redolent of its compassionate approach to claims: PERKESO itu Prihatin, Prihatin itu PERKESO!

Decision

[125] For all the reasons given above we were moved to allow the appeal and to set aside the decision of the High Court. The matter is remitted back to respondent for hearing the claim on its merit with respect to assessing the disability benefit payable to the appellant.

[126] Each party shall bear its own costs for this appeal.